WHAT A BAILOR CAN SELL. — In a short discussion of the nature of a bailor's interest, in the sixth volume of the REVIEW, p. 43, it was maintained that Blackstone was right in saying (2 Com. 453) that "the bailor hath nothing left in him but the right to a chose in action." Consistently with this view, the vendee of a bailor should not be permitted to sue the bailee in his own name. This was formerly the law. As late as 1844 it was urged at Nisi Prius that a sale by a bailor was "merely an assignment of a right of action," and Parke, B., being of that opinion, directed a verdict for the defendant in an action by the bailor's vendee. The Court of Exchequer, however, in disregard of the precedents, held this ruling of the learned judge to be a misdirection; and this innovation in procedure must now be regarded as established. 3 HARVARD LAW REVIEW, 342, n. 1.

But Blackstone's statement should still control in settling the substantive rights of the parties, and is believed to be the only ground upon which certain decisions can be supported. For example, in *Saxeby* v. *Wynne*, 3 Stark. Law of Evidence (3d ed.), 1159, A deposited goods with B and then sold them to C, and afterwards directed B to deliver them to D. B, it was decided, was not guilty of a conversion in delivering them to D. If C was simply the assignee of A's chose in action against B, the decision was clearly right, for A could not have recovered against B. If, on the other hand, C acquired a full title as owner of the goods, the decision must be wrong. *Jones* v. *Hodgkins*, 61 Me. 480, is a similar case in favor of the bailee.

It is familiar learning that one who acquires the possession of goods as a fraudulent vendee holds the title so acquired as a constructive trustee for the vendor, and that this fraudulent vendee may, like any trustee, pass the title to a *bona fide* purchaser free from the equitable encumbrance. Suppose, however, that the defrauded vendor simply sells without delivering possession. The fraudulent vendee gets not the *res*, but a conditional right *in rem*, the right to have the *res* on paying the purchase money. His legal right is the same as if he had received possession at the time of the sale, and had immediately given back the possession to the vendor as a security for the purchase money. In other words, he is substantially a pledgor, and has like any bailor only a legal chose in action. And this legal chose in action, which he obtained by fraud, he holds as a constructive trustee for the defrauded vendor. If, therefore, he purports to sell the goods to an innocent purchaser, the latter will acquire only the assignment of this legal chose in action subject to the equitable encumbrance in favor of the defrauded vendor. The *bona fide* purchaser, therefore, and not the original vendor, will be the victim of the rascality of the fraudulent vendee. This was the result of the decisions in *Globe Co.* v. *Minneapolis Co.*, 44 Minn. 153, and *Dean* v. *Yates*, 22 Ohio St. 388.

If the bailee should deliver the goods to the bailor in ignorance of a prior sale by the latter to A, no one, it is believed, would regard the bailee as liable to A for a conversion. The bailee's position would be analogous to that of a debtor who had paid his creditor in ignorance of a prior assignment of the debt to A. In each case the right of action is extinguished by fulfilment of the obligation.

But there is another mode of extinguishing the bailor's right of action after a sale by him to A. The bailor may receive from the bailee an agreed price for the goods, and in consideration thereof may authorize

him to keep and deal with the goods as his own. If the bailee has acted in good faith, A should be without remedy against him. In *Newman* v. *Newman*, L. R. 28 Ch. D. 674, a trustee who received from the *cestui que trust* a relinquishment of the latter's equitable claim, without notice of a prior assignment by the *cestui que trust* to A, prevailed against A. The right of the bailee would seem to be indistinguishable in principle from that of the trustee.

The decision in *Nicholson* v. *Harper*, [1895] 2 Ch. 415, is, however, inconsistent with the doctrine here mentioned. The bailor, after selling to A certain goods in the possession of a warehouseman, persuaded the latter to loan him money on the security of the goods. Mr. Justice North decided that the innocent warehouseman must deliver the goods to A without getting repayment of his loan to the bailor. The case was argued and decided wholly upon the effect of the Factors Acts, which were rightly held not to help the warehouseman. But the real strength of the bailee's case, that A was a mere assignee of the bailor's chose in action, seems not to have occurred to the court or counsel. If a bailor should pledge goods for present and future advances, and then sell them to A, and after the sale receive further advances from the pledgee, who had no notice of the sale to A, would the court say that A, in order to get the goods, must repay the money loaned before, but not the money loaned after the sale by the bailor? No such distinction ought to be made, and it is difficult to believe that it would be made.

RECENT CASES.

ADMIRALTY — DAMAGES IN TORT — ONE THIRD OFF NEW FOR OLD. — In a collision of two ships equally in fault, one suffered so that new parts were necessary. *Held*, that the damages must be estimated at the full value of the new parts rather than by deducting one third the cost of the new as of more value than the old parts before the accident; that the rule one third off new for old was applicable to insurance as a contract liability, but did not apply to torts, for the injured party must not be put to expense in order to be re-established. *The Munster*, 12 *The Times* L. R. 264.

The distinction is settled law; and the universal law of appraising costs of repair in insurance is not applied to injuries arising from negligence and causing liability in tort. *The Gazelle*, 2 W. Rob. 281; *The Clyde*, Swabey, 24; *The Pactolus*, *Ibid.* 124. The American law follows the English. *The Baltimore*, 8 Wall. 386. Though the real obligation in either case is to pay for the actual damage only, it is more equitable that the party in fault should pay for the unavoidable increase in the value of the property by the new materials, than that the innocent owner should have to pay to be in as good a position as he held at first.

AGENCY — DUTY OF SOLICITOR AS OFFICER OF COURT. — *Held*, that a solicitor, on connecting himself with proceedings whereby a fund had been obtained out of court should investigate and see that the court has been informed of everything necessary for a proper disposition of the matter before it. For failure to do so he must make good a loss that could have been prevented by prompt action, though there was nothing to lead him to suspect anything wrong. *The Chancery Forgery Case* (*Marsh* v. *Joseph*), 12 *The Times* L. R. 255, 266. See NOTES.

BANKRUPTCY — BANKRUPT'S DEBTOR — BANKRUPT'S RIGHT TO SUE. — An assignee in bankruptcy under the Bankruptcy Act of 1867 was appointed for plaintiff after this action of assumpsit had been begun. The assignee did not enforce plaintiff's claim against defendant, and the assignee's right to enforce it was now barred under § 5057 of the Bankruptcy Act. It was urged for defendant that by the assignment in bankruptcy a bankrupt is divested of all right to sue his debtors. *Held*, that "notwithstanding the assignment under the Bankruptcy Act, there is left in the bankrupt